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Supreme Court, U. S.
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No. ~~900~~ ~~342~~ 91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R.,
Plaintiff, Appellant,

v.

ELIAS B. WILCOX,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION TO DISMISS AND BRIEF IN SUPPORT.

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EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R., Plaintiff, Appellant, v. ELIAS B. WILCOX, Defendant, Appellee.	No.

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Comes now Ben A. Matthews, Solicitor for E. B. Wilcox, appellee, on behalf of the appellee, and respectfully moves the court to dismiss the appeal herein, upon the ground that the decree of the Circuit Court of Appeals is final and not reviewable in this court on appeal, and that this appeal was taken solely for delay.

This case was commenced in the United States District Court for Porto Rico on June 8, 1914, by the filing of a bill in equity to foreclose an alleged mortgage held by the Bank on property of Wilcox. The jurisdiction of the district court was based solely upon the diverse citizenship of the parties, the bank being a Porto Rican corporation and Wilcox a citizen of the United States. After various pleadings and motions, testimony was taken, and decree of foreclosure entered August 25, 1916. Thereafter a bill of review was filed and dismissed by the court, and an appeal was perfected on February 24, 1917, by Wilcox, to the Circuit Court of Appeals, First Circuit. That Court on December 3, 1917, entered its final decree as follows:

> "The decree of the District Court of Porto Rico is reversed and the case is remanded to that court with directions to enter a decree dismissing the bill and the appellant recovers his costs."

On February 27, 1918, the Bank filed its petition for an appeal to this Court alleging a final decree, matter in controversy in excess of $1,000, "and that this cause is one in which the decree of the Circuit Court of Appeals is not final, and is a proper cause to be reviewed by the Supreme Court of the United States on Appeal."

Section 238 of the Judicial Code provides for appeals directly to the Supreme Court from the various District Courts including the District Court for Porto Rico in the following cases only:

> "1. In any case in which the jurisdiction of the Court is in issue, in which case the ques-

tion of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision.

2. From the final sentences and decrees in prize causes.

3. In any case that involves the construction or application of the Constitution of the United States.

4. In any case in which the constitutionality of any law of the United States, or the validity of construction of any treaty made under its authority is drawn in question.

5. In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

Section 238 of the Judicial Code was brought forward from §5 of the Act of March 3, 1891, 26 Stat., 827, and was last amended by §2 of the Act of January 28, 1915, 38 Stat., 804.

Section 128 of the Judicial Code provides for appellate jurisdiction of the Circuit Court of Appeals, and impliedly authorizes appeals to the Supreme Court only in those cases which might have been carried directly to the Supreme Court from the District Courts as provided in §238.

Section 241 of the Judicial Code provides that:

"In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the

matter in controversy shall exceed one thousand dollars, besides costs."

However, §128 of the Judicial Code provides:

"The judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens * * * or citizens of different states."

This section was last amended by §2 of the Act of January 28, 1915, 38 Stat., 803, so as to include the District Court for Porto Rico.

Other provisions respecting the District Court for Porto Rico are found in the following laws:

§34 Act of April 12, 1900, 31 Stat., 85;
§3 of the Act of March 2, 1901, 31 Stat., 953.
The Act of January 7, 1913, 37 Stat., 648;
§41 of the Act of March 2, 1917, 39 Stat., 965.

The only provisions of these statutes that seem to have any possible bearing on this case are in §35 of the Act of April 12, 1900, 31 Stat., 85, which provided that writs of error and appeals might be taken from the District Court of Porto Rico in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the territories. But this section was repealed by necessary implication by the Act of January 28, 1915, 38 Stat., 803, which contained amendments to §§128, 238 and 246 of the Judicial Code, as well as an amendment to §116 of the Judicial Code, by

which the District of Porto Rico is placed within the First Circuit. These amendments, taken in connection with §6 of the Act of January 28, 1915, which provides:

> "This act shall not affect cases now pending in the Supreme Court of the United States, or cases in which writs of error or appeals have been allowed at the date of its approval,"

demonstrate to a certainty the repeal of the provision of §35 of the Act of 1900, allowing appeals from the District Court of Porto Rico directly to the Supreme Court. But even if §35 remain in force it does not authorize this appeal.

From the foregoing it will be seen that no case can be taken on appeal to the Supreme Court where the jurisdiction of the District Court was based solely upon the diverse citizenship of the parties. There is no suggestion anywhere in the record in this case that jurisdiction was based upon any other ground. An examination of the record will demonstrate that it does not fall within any of the classes specified in §238 of the Judicial Code. No constitutional or jurisdictional questions have been raised.

There being no right of appeal in this case, it must be that it was taken for delay only.

The appeal should therefore be dismissed with costs.

Respectfully submitted,

BEN A. MATTHEWS,
Solicitor for Appellee,
New York City.

April 25, 1919.